IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
MIGUEL MORA	:	**NO. 98-310-01**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **March 26, 2002**

Miguel Mora, a federal prisoner, petitions for a writ of habeas corpus under 28 U.S.C. § 2255. For the reasons stated below, his petition will be denied.

BACKGROUND

Mora entered guilty pleas and was convicted of conspiracy to distribute heroin in violation of 21 U.S.C. § 846 and reentry after deportation from the United States in violation of 8 U.S.C. §§ 1326(a)&(b). He was sentenced to 77 months of imprisonment followed by five years of supervised release. On appeal, his sentence was affirmed. See United States v. Mora, 205 F.3d 1330 (3d Cir. 1999) (unpublished opinion), cert. denied, 529 U.S. 1079 (2000). His conviction became final on April 17, 2000, when the United States Supreme Court denied certiorari. See 28 U.S.C. § 2244(d). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Mora had until April 17, 2001 to file his petition for habeas corpus. Id. On February 13, 2001, Mora moved on equitable tolling grounds for an extension of time to file a petition for habeas corpus, and this

court granted his motion. Mora timely filed his habeas corpus petition pro se. The court appointed an attorney for Mora who filed a supplemental memorandum in support of the petition.

Mora claims his trial counsel was ineffective for: (1) failing to investigate, research, and present evidence that Mora's sentence should not have been enhanced because he did not commit the instant offense while on probation; (2) failing to raise as a mitigating factor at sentencing Mora's willingness to consent to deportation at the conclusion of his sentence; and (3) failing to seek a downward departure under United States Sentencing Guidelines ("U.S.S.G.") § 5K2.0 because Mora's status as a deportable alien subjects him to harsher conditions of incarceration than other, similarly situated inmates.[1]

DISCUSSION

A. Standard of Review

Claims for ineffective assistance of counsel must be evaluated under the two-part test of Strickland v. Washington, 466 U.S. 668 (1984). First, Mora must show his "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. Next, he must show he was prejudiced by his counsel's performance because, but for his

[1]This claim, predicated on Mora's ineligibility for certain benefits (such as possible house arrest) under 18 U.S.C. § 3624(c) because of his deportable alien status, was not raised until Mora's counselled, supplemental memorandum.

lawyer's unreasonable errors, his sentence would have been different. Id. at 687.

This court must review Mora's claim with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Mora bears the burden of showing counsel's representation was unsound. Id. at 690. Counsel cannot be ineffective for failing to raise meritless claims, and counsel's strategic choices are reviewed with a strong presumption of correctness. See id.; Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996). See generally Mahoney v. Vaughn, 2001 U.S. Dist. LEXIS 428 (E.D. Pa. 2001) (following Strickland and denying a habeas petition based on a meritless ineffective assistance of counsel claim).

B. Mora's Ineffectiveness of Counsel Claim

1. Failure to Seek a Downward Departure Based On Mora's Status as a Deportable Alien

Mora argues that as a deportable alien, he is ineligible for benefits under 18 U.S.C. § 3624(c) (Bureau of Prisons may allow prisoners to serve 10% of their sentences or six months on house arrest or at a halfway house, prior to release, to "afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community"). Mora states he does not qualify for any of the exceptions allowing a

deportable alien to receive the benefits.[2]

Mora argues his ineligibility for these benefits takes his case, at least with regard to sentencing, outside the "heartland" of similar cases under the United States Sentencing Guidelines, so that a U.S.S.G. § 5K2.0 departure is appropriate. See Koon v. United States, 518 U.S. 81 (1996) (factors that take a case outside the "heartland" of cases contemplated by the relevant U.S.S.G. provision may justify a § 5K2.0 departure); United States v. Iannone, 184 F.3d 214 (3d Cir. 1999) (following Koon; increasing defendant's sentence under § 5K2.0). Mora cites United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994) (pre-Koon case holding "a downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence").

There is a split of authority on whether a defendant's status as a deportable alien is a basis for downward departure when the offense of conviction does not involve status as a

[2]A deportable alien may be eligible for benefits under 18 U.S.C. § 3624(c) if: (1) he has verified and strong family or community ties in the U.S., a verified history of over five years' domicile in the U.S., and a verified history of stable U.S. employment; or (2) the INS determines he will not be deported; or (3) the Regional Director of the Bureau of Prisons waives the requirements. See Federal Bureau of Prisons, Programs Statement 5100.04: Security Designation and Custody Classification Manual, Chapter 2-6 (September 3, 1999).

deportable alien.[3] Compare United States v. Veloza, 83 F.3d 380, 382 (11th Cir. 1996); United States v. Mendoza-Lopez, 7 F.3d 1483, 1487 (10th Cir. 1993); United States v. Nnanna, 7 F.3d 420, 422 (5th Cir. 1993); and United States v. Restrepo, 999 F.2d 640, 645-47 (2d Cir. 1993)(deportable alien status not a basis for departing downward), with United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997); United States v. Charry Cubillos, 91 F.3d 1342, 1344 (9th Cir. 1996); and Smith, 27 F.3d at 654-55 (deportable alien status may be considered for a downward departure). The Court of Appeals for the Third Circuit has not ruled on this issue. See United States v. Angel-Martinez, 988 F.Supp. 475, 483 (D.N.J. 1997) (holding deportable alien status "is unavailable as a basis for departure absent some unusual aspect of a particular case" but noting no Third Circuit authority).

a. Mora's Immigration Conviction

Everyone convicted of illegally returning to the United States after deportation must be a deportable alien, so Mora's status does not take him outside the "heartland" of U.S.S.G. § 2L1.2, "Unlawfully Entering or Remaining in the United States." See United States v. Barrios-Luviano, 2000 U.S. Dist. LEXIS 12750 (E.D. Pa. 2000) (sentence not reduced for defendant's status as a

[3]There is no split of authority when the offense at issue involves status as a deportable alien. See infra.

deportable alien); United States v. Ebolum, 72 F.3d 35, 39 (6th Cir. 1995) ("deportable alien status may not be a basis for downward departure from a sentence imposed under a guideline that applies primarily to aliens who are deportable, because the Sentencing Commission must have taken such status into account when formulating the guideline").

b. Mora's Drug Conviction

The majority of courts to consider the issue have rejected the proposition that conditions of incarceration faced by deportable aliens may be considered as a possible ground for departure in a non-immigration case. Barrios-Luviano at *6 (citing cases). Counsel cannot be faulted for not pressing this weak legal argument and focusing his efforts on attempts to win Mora downward departures for extraordinary rehabilitation under U.S.S.G. § 5K2.0 and as a minor participant in the criminal enterprise under U.S.S.G. § 3B1.2(b). Counsel's first argument obtained a one-point reduction for Mora, but the second argument was unsuccessful. Failure to move for downward departure on a basis not adopted in this circuit while employing a different strategy more likely to help the defendant was not a failure to provide reasonable assistance. Strickland, 466 U.S. at 687-89.

2. Failure to Seek a Downward Departure Based on Mora's Willingness to Consent to Deportation at Conclusion of his

Sentence[4]

Mora alleges his trial counsel was ineffective in failing to seek a U.S.S.G. § 5K2.0 downward departure based on Mora's willingness to consent to deportation at the conclusion of his sentence. In the Third Circuit,

> a defendant without a nonfrivolous defense to deportation presents no basis for downward departure under section 5K2.0 by simply consenting to deportation and ... in light of the judiciary's limited power with regard to deportation, a district court cannot depart downward on this basis without a request from the United States Attorney.

United States v. Marin-Castenada, 134 F.3d 551, 555 (3d. Cir. 1997). Mora has not established any "nonfrivolous defense" or that the U.S. Attorney has requested a departure. Since the district court could not depart downward based on Mora's willingness to consent to departure, he has not established any prejudice and has failed to satisfy his burden under Strickland.

3. Failure to Object to a Two-Level Increase of Criminal History Score Under U.S.S.G. § 4A1.1(d)[5]

On January 17, 1991, Mora was convicted of assault and battery in a Massachusetts state court and sentenced to two years' probation. On June 11, 1991, Mora failed to appear at a

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[4]This argument appears only in Mora's pro se petition, not his counselled, supplemental memorandum.

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probation violation hearing so a warrant issued for his arrest. Under Massachusetts law, Mora remained on probation until terminated by the court. See Commonwealth v. Sawicki, 339 N.E.2d 740, 743 (Mass. 1975) (court authority over a probationer does not mechanically terminate on its expiration date but extends until terminated by court order).

Mora's Massachusetts probation was not terminated until December 22, 1998, so it was pending when he committed the instant offense on March 23, 1998. Mora's criminal history score was properly increased by two points. See U.S.S.G. § 4A1.1(d)("Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation ..."). The Sentencing Guidelines provide that a defendant who commits a crime "while a violation warrant from a prior sentence is outstanding" remains under a criminal justice sentence for purposes of U.S.S.G. § 4A1.1(d) "even if that sentence would have expired absent such warrant." U.S.S.G. § 4A1.2(m).

Mora argues the U.S.S.G. § 4A1.1(d) increase in his criminal history score was improper and his counsel was ineffective for not objecting, but Mora was on probation and subject to an arrest warrant for failing to appear in Massachusetts at the time this offense was committed, so the two-point criminal history sentence enhancement was appropriate.

Objection to this enhancement by Mora's trial counsel would have been meritless, so trial counsel's assistance was not ineffective. See Strickland, 466 U.S. at 690.

CONCLUSION

Mora has not shown his trial counsel's assistance was objectively unreasonable. The instant petition under 28 U.S.C. § 2255 will be denied. There are no grounds for a certificate of appealability.

An appropriate order follows.

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ORDER

AND NOW, this 26th day of March, 2002, upon consideration of Miguel Mora's petition for writ of habeas corpus under 28 U.S.C. § 2255, de novo review of the record and the parties' memoranda, after a hearing held on January 4th, 2002 in which all parties were heard, and in accordance with the foregoing memorandum, it is hereby **ORDERED** that:

1. Mora has not established his trial counsel's representation was objectively unreasonable under Strickland v. Washington, 466 U.S. 668 (1984). There being no other grounds presented for habeas corpus, the petition is **DENIED AND DISMISSED**.

2. There is no probable cause to issue a certificate of appealability.

Norma L. Shapiro, S.J.